IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

KENNETH WESLEY CHAPMAN, JR,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 15-1-01040-7

BRIEF OF RESPONDENT

TINA R. ROBINSON
Prosecuting Attorney

JOHN L. CROSS
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

SERVICE	Jason Brett Saunders Gordon & Saunders, PLLC 1111 3rd Ave Ste 2220 Seattle, Wa 98101-3213 Email: jason@gordonsaunderslaw.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED December 21, 2017, Port Orchard, WA  **Original e-filed at the Court of Appeals; Copy to counsel listed at left.** **Office ID #91103 kcpa@co.kitsap.wa.us**

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1. Whether the trial court erred in finding that the entrapment defense was not established by a preponderance of the evidence and based on that finding refused to instruct the jury on that defense?

2. Whether a party is foreclosed from asserting an affidavit of prejudice against a judge after that judge made rulings at an arraignment hearing on the motions of the parties when neither party had notice of the other party's motions?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Kenneth Wesley Chapman, Jr was charged by information filed in Kitsap County Superior Court with attempted first degree child rape and commercial sexual abuse of a minor. CP 1-7. A first amended information was later filed charging attempted first degree child rape, attempted commercial sexual abuse of a minor, and communicating with a minor for immoral purposes. CP 47-50; RP, 11/23/15, 2.

At arraignment before the Honorable William Houser, the defense challenged the count alleging commercial sexual abuse of a minor (count II; not yet charged as attempt). RP, 9/10/15, 4-5. Chapman argued that, although impossibility is not a defense to an attempted crime, it is a defense to the completed crime charged. Id. Chapman argued that since

there was not in fact a minor involved, the offense of commercial sexual abuse is impossible. Id. Judge Houser ruled that there was probable cause for count I but not for count II. RP, 9/10/15, 5-6. The judge then proceeded to consider conditions of release on count I. Id.

Chapman asserted a motion to dismiss count II, commercial sexual abuse of a minor, making the same arguments about impossibility as had been asserted at arraignment. RP, 11/23/15, 2. But the state short-circuited that motion by amending the charge to attempt. Id. The defense conceded the issue. Id. The trial court then arraigned Chapman on the first amended information. RP, 11/23/15, 6-7.

On December 7, 2015, the defense moved to dismiss the matter for an alleged discovery violation. RP, 12/7/15, 3. The trial court did not rule on that date and, instead, granted the state's motion to continue the trial date. RP, 12/7/15, 7. On December 7, the motion was argued. 1RP 3, *et. seq.* The trial court denied the motion. 1RP 20-21.

At omnibus, Chapman gave notice that he would assert entrapment as a defense at trial. CP 465; RP, 11/4/15, 2.

On January 19, 2017, a hearing was had regarding the state's offer of proof on ER 404 (b) evidence and the admissibility of Chapman's statements to law enforcement under CrR 3.5. 1RP 25. The trial court ruled that Chapman's statements to law enforcement were a knowing and

voluntary waiver of properly provided Miranda warnings. 1RP 82. The state offered internet searches and websites visited by Chapman as ER 404 (b) evidence. The trial court ruled that the internet searches specific to children are admissible but ruled that the actual websites are not. 1RP 95-97.

At the same hearing, the parties argued about the entrapment defense. The state argued that there was no evidence in the case to support an inference that law enforcement had provided an improper inducement to Chapman. 1RP 121. The defense argued that entrapment was shown because there had been a break in the communication between Chapman and law enforcement and law enforcement had reinitiated contact. 1RP 122. The trial court provisionally granted the motion to exclude the defense, allowing the defense to reargue the issue as the trial progressed. 1RP 132. On the next trial day, the trial court inquired as to whether the defense had additional information on the entrapment issue. 2RP 152. The defense answered that it did not. Id. The trial court repeated its ruling that he did not believe that Chapman's will was overborne by the activities of law enforcement. 2RP 152-53.

At the close of evidence, the defense again requested an entrapment defense. 5RP 716. Defense counsel argued that the facts taken in trial established the defense but did not tie his factual argument to

the requirements of the entrapment statute. 5RP 716-719, 721. Relying in part on "*State v. Galisia,* 63 Wn. App. 833," the trial court ruled that the police had done no more than provide an opportunity to Chapman and had used no more than a reasonable amount of persuasion. 5RP 722. The trial court found that the criminal design had originated with the police but found also that Chapman was a willing participant. Id. The trial court ruled that the question of whether or not Chapman intended to have sex with Brooke, the 11 year old, is the jury's call. 5RP 723. The entrapment instruction was refused. 5RP 725.

Chapman was convicted on all three counts. CP 402-03. Chapman was given a low-end standard range sentence of 121.5 months. CP 429-30. The present appeal was timely filed. CP 445.

B. FACTS[1]

The Missing and Exploited Children Task Force (MECTF) is a law enforcement organization that investigates crimes associated with exploited children. 3RP 266. The MECTF provides services to law enforcement agencies across the state. Id.; 3RP 268. One aspect of the work is doing "proactive investigations." 3RP 267. These investigations

[1] The report of proceedings for trial is broken into six volumes. They are referred to herein as 1RP, 2RP, etc. Other transcripts are referred to by their dates.

involve the use of forums like Craigslist to 'build an online persona." Id. The focus is on rescuing kids and targeting people who seek to harm kids by sexual exploitation. 3RP 269.

These investigations primarily use the website Craigslist because that is where law enforcement expects to find exploitive activity. Id. It is a public website where people post personal ads or sell things. 3RP 270. Law enforcement focuses its attention on the personal ads on Craigslist; areas like casual encounters or "women seeking men." 3RP 272. The officers in this case posted most of their ads in casual encounter. 3RP 272-73. Clicking on a link like "casual encounter" takes the user to where personal ads are listed. 3RP 274. The ads may include personal information like age or a picture of the person posting the ad. Id.

These ads are often about soliciting sex. 3RP 275-76. The ads include a "reply" button. 3RP 276. An interested person would press "reply" and send an email to the person posting the ad. Id. These responses may be anonymous. Id. Thus when someone initially responds to the police ad, the police do not know who it is that responded. Id. Sometimes the exchange never goes beyond anonymous exchanges of emails and the police never know who the person was that responded. 3RP 277. These ads can also be flagged as inappropriate and Craigslist can review them and take them down. Id. This has happened to almost

every ad that the police have posted. 3RP 278. One such posting was taken down in about ten minutes but the police received "hundreds" of responses in that ten minutes. Id.

The ad in the present case was posted in August of 2015. 3RP 281. Craigslist sent the police an email saying the ad had been flagged and removed. Id. The ad read

> **PostID:5191374217**
>
> **Title:() Close taboo family. Looking for fun. Young - w4m**
>
> I am new to area and interested in new friends. I have a very close young family that is very giving. Experience with incest is a plus. Reply if interested. No RP only serious that want to meet respond. 43/f/Bremerton. Reply with a/s/l. I can tell you more when you respond. No solicitations but gifts are welcome. 2 dau

CP 18 (3RP 287, officer reads ad into the record). Communications relating to this ad will include the "PostID" number. 3RP 284. The word "taboo" in the ad is to alert the reader that the activity being sold is not necessarily "morally accepted." 3RP 286. "Taboo" may mean sex with children. Id. "Close family" is considered in law enforcement experience as referring to incest. Id. The word "young" is used instead of straight out saying there's a six year old to have sex with. Id. "43FBremerton" refers to the age, sex, and location of the poster. 3RP 287. "Respond A/S/L" means age, sex, and location of the responder. Id. "2 dau" refers to two daughters. Id.

Before the ad was flagged and removed, law enforcement received

a reply email from "James Peterson," who turned out to be Chapman. 3RP 289. Under that heading, Chapman replied to the ad. 3RP 290. Then he said "I would love to know more info about what you're looking for. Here's my pic and number (253) 267 3241." 3RP 291. That communication matched the above noted post ID. Id. Included in Chapman's email was a picture of a penis. Id.

Police respond to Chapman as the mother saying that she doesn't want the children hurt, asking Chapman if he is serious about "experience what my youthful, close family has to offer." 3RP 292. The mother tells Chapman "if you want to taste true innocence, then this is for you." Id. The mother tells Chapman "two daus 11/7," which means two daughters ages 11 and 7. Id.

Chapman responded to this offer to have sexual contact with children ages 11 and 7 with "Sounds fun. Tell me more. Do you have pics?" 3RP 293. The mother declines saying she won't send pictures of the kids. Id. Chapman then reiterates his phone number and invites the mother to text him. Id. Email communication ended and they began to communicate by text. Id. This moves the target away from Craigslist, which has flagged the ad, to another method of communication. 3RP 294.

The first day text message conversation follows in its raw form;

that is, the following is presented without the reporter's notation ((sic)) and without spelling corrections so that the court can get a sense of the nature of the actual communication between Chapman and the police posing as "Shannon."

--"James, this is Shannon, you inquired about my two daughters. Which one to you want to have paytie with," 3RP 317;

-- "I thought I was playing with the lady in the pic. What did you have in mind for your daughters?" Id.;

--"this may not e for you them. I want them to experience what I did growing up. My dad and borhre were very close with me since I was very little." Id.;

--"Oh I see. So what exactly are you thinking?" 3RP 318;

--"If you don't know, then this isn't for you." Id.;

--"I think it is. I'm just asking about boundaries." Id.;

--"No anal, no pain, more restrictive with my youngest." Id.;

--"OK. Do you have any pics?" Id.;

--"Never of my kids, that's how ou get caught. Are you a cop?" Id.;

--"Not at all. I hate cops. Are you? I'm just interested, trying to

know more." Id.;

--"Just making sure. When can we talk? i" Id.;

--"anytime. Are you a cop?" Id.;

--"Fuck no. I won't meet ou until I talk to you anyways." Id.;

--"Ok. I want more details, it turns me on." 3RP 319;

--"Will do over phone. Do you have toys, that helps since they are used to those. I have bullets." Id.;

--"No I don't have toys my cock is big and thick." Id.;

--"Yum, k how big, also whish one." Id.;

--"9 in and really thick." Id.;

--"K, I don't think o ucan go all the way in Samantha. Brook I think is ready. Who do you want and what do you want." Id.;

--"IDK. I would love a little more info so I can decide." Id.;

--"Like what?" Id.;

--"What they like what would you like me to do to and some sort of pic would be helpful." Id.;

--"I won't send pics of them, they are very sweet and will make you happy. They know that this is what I want for them and they love me. I want ou to teach tehm how to please a man. No pain

(within reason cause it hurts), and no anal." 3RP 319-20.;

--"What about you demonstrate on me and show them first." 3RP 320;

--"No" Id.;

--"Will you be watching." Id.;

--"absolutely. I have to protect tehm and make sure rules are followed I can have no clothes on if ou want." Id.;

--"Ok how do you know it's something everyone wants." Id. ;

--"Wht do you mean" Id.;

--"Do that want a man or forced." Id.;

--"A man for them." Id.;

--"Well which one can take my big cock and what do you want her to do with my cock." Id.;

--This is head into RP, if you are serious when an I call you. Rooke would e best for your big cock." Id.;

--"When will you be calling?" Id.;

--"Can call in an hour or so fi that works." 3RP 321;

--"Ok can you senbd me a pic of you." Id.;

--"No nudes I can of what they will ware for you too." Id.;

--'Are you going to send the pics also do you want me to cum inside her." Id.;

--"No condoms are a must I don't need a pregnant 11year-old and CPS frowns on kids w STDs. The pics we talked about earlier?" Id.;

--"Yes" Id.;

Here, Chapman receives a picture of some children's clothing. Id.

--"How serious are you about this and what do you want in return." Id.;

--"Did you get pic." Id.;

--"No Ididn't of you and clothes tight." Id.;

--"Ok give me some time I just left the house. You want me and the clothes? Is there a certain outfit you prefer." 3RP 321-22.

--"yes I would. Something cute would be nice. How serious are you about this and what do you want in return." 3RP 322;

--"still there." Id.;

--"Very. Roses. TracFone minutes. Gift cards. She loves video games. Xbox newer." Id.;

--“I don’t have very much. Do you not care what I look like or what my cock looks like.” Id.;

--“I am more into personality and if you are a good man.” Id.;

--“Oh ok will you be getting pleasure from watching me.” Id.;

--“Absolutely I love it when my children are having fun. As long as they are happy I will be.” Id.;

--“Have they had cock before? Are you going to send the pics still there.”

A picture of one of the detectives holding up a dress is sent to Chapman. 3RP 322. And the communication continues:

--“So have they had cock before.” 3RP 323;

Another picture partially of a female detective and of clothing is sent. Id. And the communication continues:

--“Brooke has not had full penetration Sam has not but can still make you happy,” id.;

--“So what’s next have anyone of them gotten wet yet.” Id.;

--“Yes very wet I thin k my oldest gets wet just when I mention sex so when can we talk.” Id.;

--“Now.” Id.;

--"Okay hold on I have to get rid of someone and will call on this number." Id.;

--"yes does it make you wet seeing them get wet." Id.;

--"Gonna call now." 3RP 324;

--"Ok." Id.;

The witness was unsure as to whether a phone call was placed at this time. Id. And the communication continued:

--"So did a lot of guys respond to your add." Id.;

--"Yes but I only pick a few, that's how I don't get caught and not everyone understands this lifestyle what are you gonna ware. I told brooke we may havea visitor and she is excited." Id.;

--"what would you like me to ware Really is she wet." Id.;

--"just something so I know its you. You sounded really nice on the phone, but I don't give out free sex talk. She will be wet and you won't be sorry. But I have other things to do" Id.;

--"I don't want anything free I just want to make sure were on the same page" Id.;

--"I understand. I shouldn't have told her you were gonna be here today. She is sad now." Id.;

--"So she really enjoy sex :) so why did you pick me." 3RP 325;

--"didn't pick you until after I talked to you. I told her you sound nice. So not being a jerk, you seem nice, but I have to spend time on helping my family and you sound like you are having second thoughts so have a good one." Id.;

--"No I will meet tomorrow if you want." Id.;

--"I will try to move stuff around ou said noon right. Sucks cause I have time today" Id.;

--"I wish I had time but I would feel comfortable meeting you in the day due to the risk were taking." Id.;

--"understandable k so yo must be working cause its still really light. I'll do tomorrow if you don't stand me up, I have to switch a appoitmnet can you sned me a pick of you you don't have to show your face to e safe." Id.;

--"Sure what would you like to see." Id.;

--"Just a pic showing yo are real, maybe right James on a piece of paper and a date so I know it is from today I can send you one the same way." Id.;

--"Ok I'll send one do you want a nude one or just regular ok do you want to see my cock in the pic or just regular." 3RP 326;

--"just regular. If you want you can do that, ut its not necessary, you sound nice. I think we will like you" Id.;

Chapman sends a photograph with the word "James" written on a piece of paper and Chapman askes "Yea I think so to here's my pic. When we meet tomorrow will it be just me a you." Id.;

--"once I see you are okay it will be the three of us. But you only get brooke" Id.;

--"will we go the your house or somewhere else. Will all of us be in the same room." Id.;

--"I live nearby the ampm." Id.;

--"will all of us be in the same room." Id.;

--"James I like you but you are like a little puppy that needs too much attention that I don't have time for. If you want to sleep with brooke then we can do tha. Is that clear enough. She is ready right now ill try for tomorrow." Id.;

--"Ok I understand if you can send the pic I'll leave you alone for the day don't mean to bug you." 3RP 326-27;

--"Ill sened you one like you snet soon" 3RP 327;

A picture of a detective holding up a sign that says "Shannon" list the date as 8/26/15 and includes a smiley face. Id. And the

communication continues:

--“Nice I can’t wait to meet your family.” Id.;

--“I told brooke she is excited and I know you will ask, she is wet” id.;

--“Would you and her like a pic of my cock.” Id.;

--“I will know in about 30 minutes if I got the appt moved for tomorrow” Id.;

--“What apt.” Id.;

--“I have to move a dr apt that I have at noon. Remember” id.;

--“Oh yea Would you and her like a pic of my cock” Id.;

--“Why don’t you come over and just show us right now. Getting me hot.” Id.;

--“I wish I could you are a hour away I wont be able to come till late at night so that’s why I said tomorrow may be better.” Id.;

--“Night is actually etter cause then I know you aren’t a cop for sure, they all work desk jobs and are fat (sends two emojies with smiley faces)” 3RP 327-28;

--“Yes I hate the word cop lol I just want all of us to have a great time I don’t want to be set up.” 3RP 328;

--"I am very careful wit this, I feel I can trust you now that I talked to you. If you trust me it will be worth it. Up to you" Id.;

--"How long would you like me to stay." Id.;

--"tw you look strong in the pic btw I meant" ("btw" means "by the way") Id.;

--"Yes I'm strong and tall with a heavy cock lol." Id.;

--"So I think you should come over and show us I think it will be great for all of us." 3RP 329;

--"I agree it will be great I will be over there and if we have a good time I would mind coming back—Wouldn't" Id.;

--"Tonight that makes me really happy I just otld her" Id.;

--"The earliest I can be there tonight is 1 am how long did you want me to stay for." Id.;

--"So are you at work. Why so late. They may be totally asleep." Id.;

--"yes I have some side work till 10 that's why so late how long did you want me to stay for when I come over." Id.;

--"It depends on ow they like you. If you bring a game they wont want you to leave," Id.;

--"Ok so what should I wear or will all of us just be nude." Id.;

--"james, we are going down that road again. If you want it get your ass over here. If not hopefully we are here tomorrow." Id.;

--"well I want to feel comfortable me just blindly coming to your home isn't smart this is a arrangement that could happen often you rushing makes me feel uncomfortable I have questions and I hope you do to" 3RP 330.

And so ends the first day of communication between Chapman and Shannon (Detective Rodriguez). The next day, the conversation picks up again for a brief period wherein Shannon accuses Chapman of not intending to show up and he continues to express his interest in coming over to her house. 3RP 330.

Then, on the day after that, the communication begins again when Shannon sends a "hey" to Chapman and asks if he is still interested. 3RP 330. He expresses continued interest and wants to know how much and what Shannon wants him to do with Brooke. 3RP 331. The two continue to negotiate over exchanging more pictures. Id. A picture of a trooper is sent and Shannon extolls her body and wants she and Chapman to talk. Id.

As the conversation continues, Shannon feigns losing

interest because Chapman will not commit to coming at an early time and she is afraid he is police trying to set something up. 3RP 332. He expresses continued interest and again offers to send a picture of his penis. Id. The two continue their negotiation dance trying to arrange a time to consummate their discussed goal and Shannon quotes him a price of "150 roses" meaning dollars. 3RP 333.

Chapman seems put off by the price and expresses his reluctance to pay that much for a short period of time. 3RP 334. They discuss a day to get together but Chapman seems irritated that Shannon does not seem to want to further negotiate the price, says he feels disrespected and signs off. 3RP 336.

Three days later (August 28 to August 31), Shannon reinitiates communication expressing that she was nervous and sorry to disrespect Chapman. 3RP 337. The conversation quickly turns once again to how Brooke is and that Brooke is excited about meeting Chapman. Id. They then again discuss "a gift" as payment. 3RP 338. Chapman says he wants this arrangement to be a regular thing. Id. Chapman expresses concern that he is being set up for a robbery. Id. Shannon calms those fears, saying that he is not bringing enough to rob. Id.

They discuss meeting at the ampm near Shannon's home. 3RP 339. Later, Shannon sends out to Chapman wondering where he is. Id. He indicates trouble getting up the money, says he has 50, and she asks what he wants for 50. Id.

The next day (September 1), the conversation continues. 3RP 339-40. They focus on the next day and discuss what Chapman should bring. 3RP 341. This discussion includes the things that Shannon says Brooke wants like "budlite mango ritas." 3RP 341. Further discussion includes that Shannon will watch what Chapman is doing to Brooke and join in if she is excited enough. 3RP 342. Chapman asserts that both Brooke and Shannon will not be disappointed. 3RP 343. When Shannon asks Chapman directly whether he is only interested in her, he replies "No" he just wants to know what they both like. 3RP 344. He asserts his desire to "finish inside" of Brooke and believes that Shannon will find this to be "really hot." Id. They end by discussing the sex acts that will be involved when they meet the next day. 3RP 346-47.

Similar banter and negotiating, focused primarily on the time and place of their meeting, goes on for several more pages of transcript. 3RP 348-351. The next day (September 2), Chapman

texts Shannon at 7 a.m. 3RP 351. He sends twice more looking to get Shannon's attention and asking whether they were on to meet that day. 3RP 351-52. They agree to 2 p.m. that day and further discuss what Brooke and Shannon will wear to the tryst. 3RP 352. They exchange more pictures and Chapman says he is on his way. 3RP 354. At one point Chapman askes who will be there when he arrives and she says "Brooke, Sam and me." 3RP 356.

The two continue to text and eventually Chapman tells her that he has arrived at the ampm and she tells him where her apartment is. 3RP 359. He wants her to come out when he gets there. Id. She says to wait because she has to get dressed. Id.

Detective Sergeant Rodriguez related a phone conversation in which Chapman thought he was talking to Brooke. 3RP 379-80. During that conversation, Chapman told the fake Brooke that he wanted to come on her face. Id.

Unknown to Chapman is that when he arrives at the ampm police are surveilling him. 3RP 366. When he drove to the apartment, he would not get out so the police went down to his car and arrested him there. 4RP 475. He was then escorted into the apartment. 4RP 477. A search incident to arrest revealed that Chapman had condoms in his pocket. 4RP 478. In Chapman's

car, arresting officers saw a package of Sour Patch candy a Monster energy drink, and a paper bag with a wine bottle sticking out of it. 4RP 536. A consent search of Chapman's car revealed a Safeway receipt for the bottle of wine dated the same day and indicating that the purchaser got $50 in cash from the transaction. 4RP 555.

Chapman admitted that he texted a picture of his penis to the police. 5RP 617. He admitted that he engaged in inappropriate talk about sex with children. 5RP 618. He claimed that his conversations with "Shannon" were just an exercise in telling her what she wanted to hear. 5RP 619. He claimed that during his discussions with Shannon he was not sure if she had children but he knew that Shannon was not promising to have sex with him so he was not interested. 5RP 620.

Chapman testified that his entire interest was in Shannon. 5RP 621. Rather than being over-borne by being re-contacted, he got excited because she used a term of endearment—"bae." 5RP 623-24. He brought the candy and the energy drink to Shannon so that she could give it to the children. 5RP 625-26. He claims that if Shannon had come down to his car and been unattractive, he would have left. 5RP 631.

III. ARGUMENT

A. FEDERAL AUTHORITY DOES NOT CONTROLL BECAUSE FEDERAL LAW IS DIFFERENT THAN WASHINGTON LAW AND UNDER WASHINGTON LAW THE DEFENSE OF ENRAPMENT WAS NOT ESTABLISHED BY A PREPONDERANCE OF THE EVIDENCE.

Chapman argues that the trial court erred in not allowing an entrapment defense argument and in not instructing the jury on that defense. This claim is without merit because the federal cases on which he relies contain substantial differences in standards and burdens of proof and are of dubious application and because he simply has not met his burden of establishing the defense by a preponderance of the evidence.

Washington has codified the entrapment defense as follows

> 1) In any prosecution for a crime, it is a defense that:
>
> (a) The criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and
>
> (b) The actor was lured or induced to commit a crime which the actor had not otherwise intended to commit.
>
> (2) The defense of entrapment is not established by a showing only that law enforcement officials merely afforded the actor an opportunity to commit a crime.

RCW 9A.16.070. From that statute comes the entrapment jury instruction

> Entrapment is a defense to a charge of(fill in crime)if the criminal design originated in the mind of law enforcement officials, or any person acting under their direction, and the defendant was lured or induced to commit a crime that the defendant had not otherwise intended to commit.
>
> The defense is not established if the law enforcement officials did

> no more than afford the defendant an opportunity to commit a crime. The use of a reasonable amount of persuasion to overcome reluctance does not constitute entrapment.
>
> The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty [as to this charge].

Washington Pattern Jury Instructions-Criminal 18.05.

1. Federal law on entrapment differs from Washington law and therefore federal cases addressing the defense are of dubious application.

Although persuasive federal authority may inform the present inquiry as to the requisites of the entrapment defense, caution is indicated in relying on the results of federal appeals in this area of the law. Under federal law, the government has the burden of showing that a defendant has a predisposition beyond a reasonable doubt. *Jacobson v. U.S.*, 503 U.S. 540, 546, 112 S.Ct 1535, 118 L.Ed.2d 174 (1992). In Washington, the burden falls to the defendant to establish the defense by a preponderance of the evidence. *See* WPIC 18.05. Here, Chapman advances the proposition from federal law that a ready response to solicitation does not prove predisposition by a quote from the *Jacobson* decision. Brief at 37. Further along, he relies on the *Jacobson* Court's conclusion that the prosecution had failed as a matter of law to prove Jacobson's predisposition. Brief at 53.

Two problems attend these assertions: First, that holding was

driven by facts having little resemblance to the present case, including "over the next 2 1/2 years repeated efforts by two Government agencies through five fictitious organizations and a bogus pen pal, to break the new law by ordering sexually explicit sexual material." The police activities in the present case were not nearly as long-standing, comprehensive, and intrusive (the Government sent Jacobson questionnaires about his sexual preferences) as the Government behavior in that case. Second, and to the point of factual analysis of entrapment claims, that holding in *Jacobson* followed from there being a burden on the Government to prove the point beyond a reasonable doubt.

Thus, neither the holding in *Jacobson* nor the Court's analysis in reaching that holding provide much guidance in the present case. Different burdens of proof and different standards of proof lead to different results. The *Jacobson* holding that in that case the government failed to prove the point beyond a reasonable doubt gives little or no guidance to the question of whether Chapman has satisfied his burden to prove lack of intent to do the crime by a preponderance of the evidence.

The same difference in the inquiry can be seen in *U.S. v. Poehlman*, 217 F.3d 692 (9th Cir. 2000); a case much relied upon by Chapman. The analytical framework of the defense under federal law is there noted

> To raise entrapment, defendant need only point to evidence from which a rational jury could find that he was induced to commit the crime but was not otherwise predisposed to do so. Defendant need not present the evidence himself; he can point to such evidence in the government's case-in-chief, or extract it from cross-examination of the government's witnesses. The burden then shifts to the government to prove beyond a reasonable doubt that defendant was not entrapped.

217 F.3d at 698. Under the heading of "predisposition," the *Poehlman* Court proceeded to consider "whether there is evidence to support a finding that Poehlman was disposed to have sex with minors prior to opening his correspondence with Sharon." A comprehensive and searching review of the facts follows but the question is always does the evidence reviewed satisfy the government's burden beyond a reasonable doubt. The *Poehlman* Court ultimately found no evidence of predisposition. 217 F.3d at 705. But that finding is specific to the facts of that case when viewed under the proper, federal standard of proof. Under federal law, then, a defendant's burden of simply producing some evidence in order to shift the burden to the government is quite different than the proper standard under Washington law.

As to Washington law, in *State v. Lively*, 130 Wn.2d 1, 921 P.2d 1035 (1996), our Supreme Court considered the very issue here discussed. Lively argued that if she produced evidence of the defense sufficient to raise a reasonable doubt of guilt, the burden should shift to the prosecution to persuade the jury beyond a reasonable doubt that she was not entrapped.

130 Wn.2d at 10. The Court found that the defense is not of "constitutional dimension." Id. at 11. Entrapment is an affirmative defense akin to duress and "[i]n Washington, however, defendants are required to prove affirmative defenses by a preponderance of the evidence because generally, affirmative defenses are uniquely within the defendant's knowledge and ability to establish." 130 Wn.2d at 13 (internal quotation and page break omitted). Thus, "Defendants should ultimately be responsible for demonstrating that they were improperly induced to commit a criminal act which they otherwise would not have committed." Id.

After establishing that the burden of proof falls to defendants, the *Lively* Court considered Lively's challenge to the sufficiency of the evidence. Lively argued federal law on the point of the appropriate standard of review, citing *Sherman v. United States*, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958) and *Jacobson v. United States*, 503 U.S. 540, 112 S.Ct. 1535, 118 L.Ed.2d 174 (1992). 130 Wn.2d at 16. The Court answered by noting that

> These cases, however, are of little help in determining what standard of review should be applied in deciding whether the trial court erred in allowing this case to go to the jury since Washington, unlike federal law, places the burden on the defendant claiming the affirmative defense.

Id. In this way, our Supreme Court underlined the argument that the state

is making here. State and federal law on the entrapment defense differ in a manner that leads to differing analysis of the facts of a given case. In the end, the standard of review was set down as "whether, considering the evidence in the light most favorable to the State, a rational trier of fact could have found that the defendant failed to prove the defense by a preponderance of the evidence." 130 Wn.2d at 17; *accord State v. Lambert*, 199 Wn. App. 51, ¶106, 395 P.3d 1080 (2017) (section UNPUBLISHED AND UNBINDING, cited here to establish that the rule from *Lively* is still applicable); *see also In re the Detention of Turay,* 139 Wn.2d 379, 402, 986 P.2d 790 (1999) ("federal case law interpreting a federal rule is not binding on this court even where the rule is identical [because] [t]his court is the final authority insofar as interpretations of this State's rules is concerned."). This, then, is the appropriate standard of review in the present case. And, great caution is indicated in the consideration of federal authority that shares neither the same standard of review nor the same burdens and quantum of proof. While it remains true that the same subjective framework as the federal rule has been codified in Washington, and thus federal authority may have some persuasive impact in defining the contours of the defense, the results of federal appeals follow from different legal analysis.[2]

[2] Thus the state disagrees with Chapman that the quote from *Lively* "The statute thus constitutes a restatement of the subjective test of entrapment as applied by both federal

2. Under Washington law, Chapman failed in his burden to establish the defense.

As the foregoing establishes, Chapman must show that, taking the facts in the light most favorable to the state, no rational jury would have found that he proved the defense by a preponderance of the evidence. *See State v. Lively, supra.* "Under Washington law, [juries] are to be directed to the question of whether the criminal design originated in the mind of law enforcement officials who lured or induced the defendant to commit a crime which he otherwise had not intended to commit." *State v. Smith,* 93 Wn.2d 329, 350, 610 P.2d 869 (1980) (alteration provided). Further, "[i]n affording a suspect with an opportunity to violate the law, police may use some subterfuge. For example, an officer may pose as a drug dealer, fence, or prostitute." 93 Wn.2d at 350.

The statute poses the question whether the defendant is induced to do a crime that he "had not otherwise intended to commit." RCW 9A.16.070 (1) (b). But a defendant may have a great deal of predisposition with regard to a particular crime but not, on the occasion, have intended to commit the crime induced by the police. As the *Lively* Court puts it

> The defendant must "demonstrate that he was tricked or induced into committing the crime by acts of trickery by law enforcement agents. Second, he must demonstrate that he would not otherwise

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and Washington State court" is an invitation to completely rely on federal authority. Appellant's Brief at 36.

have committed the crime.

130 Wn.2d at 10. The *Lively* Court places the burden on the defendant to demonstrate that he would not otherwise have committed the crime, not to disprove that he was predisposed to commit the crime.

As Chapman notes under federal law the "prosecution must prove beyond [a] reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents." Brief at 52 *citing Jacobson, supra,* 503 U.S. at 549. The obvious analytical problem that attends the different standard is that under Washington law, the defendant would have the burden to prove a negative—that he was not predisposed before police contact. The Washington statute is more focused on the immediate inducement. No part of Washington law limits the evidence that a defendant may rely on in making his proof to a time period before he is contacted by police. This analytical difficulty is often seen in Chapman's argument (see below regarding jury instructions).

Moreover, at least one Washington court has held to a rule that is contrary to the federal rule upon which Chapman relies. Chapman asserts that the this court should follow the federal rule that predisposition must be shown at a time period before police contact and thus ready participation after contact does not establish the government's burden. In *State v. Swain,* 10 Wn. App. 885, 520 P.2d 950 (1974) *review denied* 84

Wn.2d 1004 (1974), it was held that "proof of ready complaisance on the part of the person solicited by the police officer or state agent to commit the crime is evidence of predisposition to commit the crime." 10 Wn. App. at 889-90 (page break omitted). In the present case, Chapman whole heartedly engaged in law enforcement's inducement, which, under Washington law, is evidence of predisposition but, arguably, is not evidence of predisposition under federal law.

Herein, the police used deception and artifice in inducing Chapman to come to Bremerton ready to have sex with an eleven year old girl and her mother. But these actions do not establish the defense and the point of the exercise, both by law enforcement actions and in legal analysis, is that Chapman did just that. *Smith*, 101 Wn.2d at 43. And, "even if the criminal design originated in an officer's mind, a defendant may become a willing actor in a drug deal and, thus, defeat an entrapment defense." *State v. Galisia*, 63 Wn.App. 833, 838, 822 P.2d 303 (1992). "This occurs when he or she continues participating in the developing transaction and willingly associates himself or herself with it." Id. Chapman's actions of communicating and negotiating under these circumstances tends to show he was not "tricked." Here the police used no more than a "normal" amount of persuasion; they essentially just said that the sex is here if you want it. *State v. Keller*, 30 Wn. App. 644, 647, 637 P.2d 985 (1981) *review denied* 100 Wn.2d 1023 (1983).

There does not appear to be a need to "trick" Chapman because he came to the case looking for exactly what the police were selling. 30 Wn. App. at 647 ("The defense will not be allowed when the evidence indicates merely that the defendant was given an opportunity to commit the crime with which he is charged."). Much of the communication between Chapman and the police show his willingness to take advantage of the opportunity that the police were providing. His intent is manifest at the beginning: Chapman responded to an ad that speaks of sex with a young family, that says that experience with incest is a plus, and that says there are two daughters involved with an email stating "Sounds fun. Tell me more. Do you have pics?" 3RP 293. When the method of communication changes to text messaging, it is immediately made clear that Chapman is inquiring about sex with the two daughters and he replies "What do you have in mind for your daughters?" 3RP 317. A few lines later when the police tell him that this may not be for him, he responds with "I think it is." 3RP 318. Within minutes of responding to an ad that was posted by people that Chapman does not know, he is telling the police that this kind of setup is for him and he wants to know what kind of sex he should have with the children. Within a very few more lines, Chapman is asking whether the mother wants him to "come inside" an eleven year old girl. 3RP 321. And, to this point in the communication the only persuasion being applied by the police is the simple offer of sex with

children. This constitutes the "normal" amount of persuasion that a real person offering her children would use.

Chapman's primary defense was that he had no intent as to the eleven year old girl but, rather, was interested in sex with the mother only. However, he knew, from the communications he had had with the mother, that the eleven year old was to be involved. He looked on the internet in an attempt to find out whether the eleven year old would have pubic hair. 3RP 397. He brought sports drink and candy for the girl (clearly distinguishable from the adult gift, wine and marijuana, that he brought the mother). He drove a long distance while having been advised that the girl would be there upon his arrival. His stated reluctance at the apartment building was because he was concerned about being robbed or concerned about Shannon's appearance, not because he was concerned about there being a child present for sex. 3RP 338. In any event, Chapman's argued reluctance does not establish the defense. *State v. Trujillo*, 75 Wn. App. 913, 918, 883 P.2d 329 (1994).

Chapman never said to the posing police "no, if there's a minor child involved, I'm not interested." The record is clear that Chapman knew exactly what he was about to do when he came to the apartment complex. Moreover, his initial answering of such an ad evinces an intent to explore the type of forbidden sex that the police were selling. He has not established by a preponderance of the evidence that the crimes of

conviction were crimes that he would not intend to do absent the police inducement. Thus the trial court did not abuse its discretion in refusing to allow the defense.

Taken in a light most favorable to the state, the evidence shows that the police by subterfuge provided Chapman with an opportunity to commit the charged crimes. In any light, the evidence shows that it did not take much persuasion to induce Chapman to use that opportunity (compare the 2 and ½ year attack of the government in *Sherman, supra*). Moreover, the communications between Chapman and the police are evidence of Chapman trying to negotiate the use of the opportunity provided in a manner that made him feel more comfortable about the situation, not evidence of them having to persuade him that sex with a minor was a good idea. Negotiating on how the crime is to be done is different than being persuaded to do the crime in the first instance.

Chapman has failed to satisfy his burden. The defense of entrapment was properly refused by the trial court.

3. Jury instruction

Chapman claims that the trial court erred in failing to instruct the jury on the entrapment defense. Of course, if the trial court was correct in ruling as a matter of law that the defense was not established by a preponderance of the evidence, this claim has no traction. A defendant has a right to present his defense to the jury. *State v.*

Williams, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997). However, a defendant may only have the jury instructed on an affirmative defense if he offers sufficient admissible evidence to justify the giving of the instruction. *Williams,* 132 Wn.2d at 259-60. Review of a trial court refusal to give an instruction when based on a lack of factual support is for abuse of discretion. *See State v. Lucky,* 128 Wn.2d 727, 731, 912 P.2d 483 (1996) *overruled on other grounds by State v. Berlin,* 133 Wn.2d 541, 544, 947 P.2d 700 (1997).

Chapman asserts that the instruction should have been given because "the government cannot show he was predisposed to committing such an offence *before the government initiated the sting operation."* Brief at 57. First, as has been discussed, the "government" need not prove or disprove any element of the defense. Further, as has been discussed, under Washington law, the party with the burden of proof, the defendant, is not and should not be tasked with proving the negative of his lack of predisposition at some unspecified time before the operation. He need only convince the trier of fact that he did not otherwise intend to do the crime.

Second, Chapman has simply not established that proof of predisposition before the sting operation is consistent with the Washington statutory affirmative defense. The state agrees that outrageous government conduct is not necessary to establish the defense. The *Lively*

Court makes this clear in considering the two defenses separately. But the state does not agree with an analysis that consistently flows from and leads back to what the government needs to prove beyond a reasonable doubt.

Moreover, the state does not agree with Chapman's take on the import of certain facts in the case. For instance, Chapman in this section repeats that he was "pressured" into a long car drive and the purchasing of candy for Brooke. Chapman was given an opportunity; nothing the police did "force[d] him to make the substantial step of driving out to Kitsap to have sex with Shannon and Brooke." Brief at 60. He made the personal choice to pursue that opportunity. Further, according to Chapman, when he went to have sex "with Shannon and Brooke" the police took advantage of him because of course it was legal to have sex with one of the two.

In this argument, Chapman again resorts to federal authority. Here, he argues primarily from *United States v. Gamache*, 156 F.3d 1 (1st Cir. 1998). There, the government set up a sting operation similar to that in the present case. The trial court had denied the entrapment defense. In reversing, the First Circuit noted that the defendant must show "improper inducement" and a "lack of predisposition." 156 F. 3d at 9. But the defense burden is to show but "some" evidence of these things or enough to raise a reasonable doubt "as to whether he was an unwavering innocent rather than an unwavering criminal." Id. (internal quotation omitted). And, as we have seen, once this showing is made the burden shifts to the

government to prove predisposition beyond a reasonable doubt. Id. Thus this case involves the same analytical problems in contrast to Washington law that the other federal cases share.

In this context, it was held that the type of sting operation in that case, and thus the present case, do not constitute improper inducement if they merely provide an opportunity. 156 F.3d at 9. Under these circumstances, the defendant must show opportunity and "something else" in order to meet his "some" evidence burden. Id. For example, the "something else" may be "threats, forceful solicitation and dogged insistence, and repeated suggestions." Id. In Chapman's case, he was not threatened or subject to forceful solicitation or dogged insistence; he was asked more than once but in the context of the First Circuit's analysis we do not know how many times "repeated" means.

In the end, the court placed emphasis on the fact that the initial communications between Gamache and the police made it quite clear that Gamache answered the ad in an effort to commence a romance with the adult woman with whom he thought he was communicating. 156 F.3d at 11. Further, the government's efforts in that case had gone on for seven months. Id. The Court likened the government's efforts as similar to the *Jacobson* case where the government used "a fake lobbying organization to appeal to anti-censorship motives." Id.

Regarding predisposition, *Gamache* relies on the federal rule, not

established as an applicable principle under Washington law, that there needs to be proof of predisposition before contact with the government. 156 F.3d at 12. And, of course, this question is burden to the government to prove beyond a reasonable doubt.

Chapman tried to argue that he too was only in the deal to have sex with the adult parent. But his initial communications with police are far from Gamache's initial communication. Here, Chapman did in fact readily accept the opportunity provided by the police. And the police never added "something else" besides sex to the inducement. There were no fake lobbying organizations. There were no attempts to manipulate the target, Chapman, into believing that the sex was in some sense acceptable behavior as was done in *Gamache*.

The police provided Chapman with an opportunity to have sex with an eleven year old and nothing else save that her mother might join in. Chapman jumped at the chance. He failed to convince the trial court that the instruction should be given because he failed to establish improper inducement and failed to establish that absent law enforcement inducement he did not otherwise intend to commit such crimes.

B. THE ISSUE UNDER RCW 4.12.040 IS NOT A CONSTITUTIONAL ISSUES, MUST BE PRESERVED, AND WAS NOT PRESERVED AND RULINGS BY A JUDGE AT ARRAIGNEMENT OF A CRIMINAL MATTER ON THE PARTIES' ORAL MOTIONS OF WHICH THE OTHER PARTY DID NOT HAVE NOTICE DO NOT FORECLOSE A LATER AFFADAVIT OF PREJUDICE AGAINST THAT JUDGE.

Chapman next claims that the trial court erred in accepting the state's affidavit of prejudice regarding Judge William Houser because the judge had made a discretionary ruling at arraignment. This claim is without merit because the possible discretionary ruling was entailed in the statutory exception of arraignment and because by its plain language the statute does not foreclose an affidavit of prejudice when a motion is brought of which the party making the affidavit, here the state, had no notice.

1. The issue raised is not a manifest constitutional issue and must be preserved.

Chapman assert that "The Washington Supreme Court has not addressed the issue of whether an objection is required in order to preserve this issue for appeal." Brief at 86. This assertion is incorrect. In *State v. Gentry*, 183 Wn.2d 749, 356 P.3d 714 (2015), the Washington Supreme Court did address the precise issue that Chapman alleges they have not. There, the Court clearly held that issues under RCW 4.12.050 are not

manifest errors affecting a constitutional right but, rather, flow from the statute. 183 Wn.2d at 760. This fully recognizing the statute's self-executing nature. As such preservation of the issue is required. Id. Chapman did not object to the state's filing and thus the issue is not preserved.

2. The statute unambiguously excludes rulings by judges on motions for which the other party did not receive notice.

The interpretation of a statute is a question of law, which is reviewed de novo by this court. *Wash. Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wash.2d 637, 645, 62 P.3d 462 (2003). "If the statute's meaning is plain on its face, we must give effect to that plain meaning as an expression of legislative intent." Id. An unambiguous statute should not be subjected to judicial construction. *Fraternal Order of Eagles, Tenino Aerie v. Grand Aerie of Fraternal Order of Eagles*, 148 Wash.2d 224, 239, 59 P.3d 655 (2002).

Former RCW 4.12.050 is "unambiguous and clear on its face." *State v. Tarabochia*, 150 Wn.2d 59, 66, 74 P.3d 642 (2003). In particular, the statute is unambiguous as to the issue raised by Chapman and need not be construed beyond its plain meaning. The statute provides

> Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such

> party or attorney cannot, or believes that he cannot, have a fair and impartial trial before such judge: *Provided*, That such motion and affidavit is filed and called to the attention of the judge before he shall have made any ruling whatsoever in the case, either on the motion of the party making the affidavit, or on the motion of any other party to the action, *of the hearing of which the party making the affidavit has been given notice*, and before the judge presiding has made any order or ruling involving discretion, but the arrangement of the calendar, the setting of an action, motion or proceeding down for hearing or trial, the arraignment of the accused in a criminal action or the fixing of bail, shall not be construed as a ruling or order involving discretion within the meaning of this proviso; and in any event, in counties where there is but one resident judge, such motion and affidavit shall be filed not later than the day on which the case is called to be set for trial:

(emphasis added) The provision was enacted in 1911. *See Marine Power & Equipment Co., Inc. v. Industrial Indem. Co.,* 102 Wn.2d 457, 462, 687 P.2d 202 (1984). Chapman argues this issue with reference to present court rules but does not tell us whether or not the same rules were extant in 1911. Further, he tells us nothing about the scope of an "arraignment" hearing in 1911. At bottom, he has not demonstrated that in 1911 an arraignment hearing did not include the setting of conditions of release.

Chapman's focus is on the discretionary ruling part of the statute. But the rule has two qualifying provisions. The affidavit must be filed before the court makes "any ruling whatsoever" on a motion by either party "of the hearing of which the party making the affidavit *has been given notice."* (emphasis added). The present case involves a defense motion that was brought at the time of arraignment and of which motion the state had no notice. Thus under the plain language of RCW 4.12.050,

even if Judge Houser's ruling on the defense motion challenging probable cause at arraignment may be said to be a discretionary ruling, that ruling, given without notice of the motion to the state, does not foreclose the later affidavit of Judge Houser. Similarly, the defense had no notice of the conditions of release that the state may seek and the state had no notice that the defense would move for certain exceptions to the release conditions.

In 1984, our Supreme Court reviewed fifty year old precedent regarding this statute, saying "In *State ex rel. Goodman v. Frater,* 173 Wash. 571, 24 P.2d 66 (1933), this court considered a motion brought by a third party defendant who had been joined, after judgment, and two days into the execution phase of the trial. We there held that the movant was entitled to the benefit of the statute despite its obvious interference with the orderly administration of justice at that late stage in the proceedings. We noted:

> It is hard to see why, under the circumstances here present, [the movant] should be deprived of the statutory right simply because she was brought into the case, against her will, after the original complaint was filed or, indeed, after the judgment was entered."

Marine Power & Equipment Co., Inc. v. Industrial Indem. Co., 102 Wn.2d 457, 463, 687 P.2d 202 (1984). A party joined after trial was allowed to affidavit the judge. This because that party, as the state herein, had no notice of the proceeding. The state here, as with the litigant in

State ex el. Goodman, would have no way to prepare for a ruling if it did not know the issue would be raised. Under Chapman's reading, any defendant who does not agree to probable cause at arraignment could by that simple, and not unusual, act foreclose the state's right as litigant under RCW 4.12.050. This is a strained and absurd reading of the statute. And, this is why the notice provision is found in the rule. Moreover, Chapman's approach would seem to foreclose a defendant's use of the statute—a defendant would need to know that she is put to the choice of either challenging probable cause at arraignment and thereby seeking a discretionary ruling or not challenging probable cause, even if it is lacking, so as to preserve her right to later strike the same judge.

Properly read, the statute does not place either party in such a conundrum. It should be held that such motions as those argued here are entailed by the arraignment exception to the rule. But Chapman's issue fails under the statute's notice provision in any event.

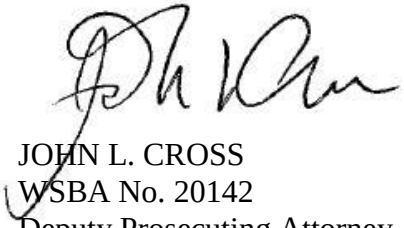
IV. CONCLUSION

For the foregoing reasons, Chapman's conviction and sentence should be affirmed.

DATED December 21, 2017.

Respectfully submitted,

TINA R. ROBINSON
Prosecuting Attorney



JOHN L. CROSS
WSBA No. 20142
Deputy Prosecuting Attorney

Office ID #91103
kcpa@co.kitsap.wa.us

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